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In the Supreme Court of the United States

OCTOBER TERM, 1991

ALTON T. WEBSTER, PETITIONER

v.

DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's claim that he was dismissed from his employment because he engaged in protected activities.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 911 F.2d 679.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1990. A petition for rehearing was denied on February 1, 1991. Pet. App. D. The petition for a writ of certiorari was filed on May 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed by the Army as a civilian mail clerk at Fort Bragg, North Carolina. In December 1988, he was dismissed from his employ-

ment for 11 incidents of misconduct, including insubordination, disrespect towards his supervisor, discourtesy, willful violation of rules and regulations, and creating a disturbance resulting in an adverse effect on morale and maintenance of proper discipline. Petitioner's supervisor, Willie L. McCain, recommended petitioner's dismissal; a higher official approved the dismissal. Pet. App. A2.

2. Petitioner appealed his removal to the Merit Systems Protection Board. After an evidentiary hearing, an administrative judge (AJ) sustained 5 of the 11 specifications of misconduct. The AJ found that petitioner: (1) failed to report to his supervisor before turning in his vehicle, because he believed that the reporting policy "did not make sense"; (2) disregarded his supervisor's instruction to assemble outside the building during a fire drill, and instead left the area to get ice cream; (3) failed to follow an instruction to stamp mail to be forwarded, and challenged his supervisor's authority to issue such an instruction; (4) interrupted a conversation between another civilian postal employee and two uniformed service members with a "childish tirade," during which he used crude language and was rude and disrespectful to a lieutenant; and (5) responded to a question from his supervisor with the words, "Are you crazy?". Petitioner had been disciplined for four prior instances of misconduct involving insubordination, creating a disturbance, and use of abusive and offensive language, and had been warned that "future incidents of this nature will not be tolerated and will be the basis for more severe disciplinary action." Pet. App. A3-A8.

The AJ, observing that "[t]he agency cannot tolerate disrespectful conduct to a supervisor, the *open*

refusal to follow supervisory directives and discourteous conduct to military personnel," found that removal was consistent with the agency's table of penalties and was an appropriate penalty for petitioner's misconduct, Pet. App. A9. The AJ also rejected petitioner's contention that he was removed as a reprisal for serving as a union shop steward and writing letters to a United States Senator and a postal inspector complaining about his supervisor.

In rejecting petitioner's reprisal claim, the AJ applied the four-part test of *Warren* v. *Department of the Army*, 804 F.2d 654, 656-658 (Fed. Cir. 1986): (1) whether the employee engaged in a protected activity; (2) whether the accused official knew of the protected activity; (3) whether the adverse action under review could, under the circumstances, have been retaliation; and (4) whether there was a genuine nexus between the retaliatory motive and the adverse action. Pet. App. A23-A24. The AJ concluded that petitioner met the first three parts of the *Warren* test, but found no evidence to show a causal nexus between the agency's retaliatory motive and its adverse action. The AJ found that "the intensity of the agency's retaliatory motive was high." *Id.* at A53.[1] But the AJ observed that "[f]ive of the eleven specifications were sustained after my de novo review," and the specifications involving petitioner's supervisor "all involve active misconduct on the appellant's part." *Ibid.* The AJ also found that "an imaginary supervisor[] who was unaware of the appellant's protected conduct would conclude from the objective facts that an adverse decision was warranted." *Ibid.*

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[1] Appendix A to the petition separately paginates the court of appeals' opinion and the dissenting opinion. References to Pet. App. A herein assume continuous pagination.

Petitioner failed to seek review of the AJ's decision by the MSPB, but took an appeal to the United States Court of Appeals for the Federal Circuit. See 5 U.S.C. 7703(b)(1).

3. The court of appeals affirmed. Pet. App. A1-A30. The court concluded (*id.* at A10-A23) that each of the five specifications of misconduct is supported by substantial evidence on the record, and that the AJ correctly analyzed the appropriateness of the penalty under the 12-factor test of *Douglas* v. *Veterans Admin.*, 5 M.S.P.B. 280 (1981). The court then rejected petitioner's contention that his dismissal was a reprisal for his protected activities as a shop steward and for writing letters complaining about his supervisor.[2] Petitioner had offered no direct or circumstantial evidence to satisfy his burden of proof on the nexus issue, and the AJ had not found such a nexus. The court of appeals concluded that "we cannot say this record, as a matter of law, requires such an inference of nexus." Pet. App. A26.

Although the AJ found that "retaliatory motive 'could' have been a factor," the court explained that "[r]etaliatory motive does not, *ipso facto* require a finding of causation." *Id.* at A26-A27. The court noted that the AJ's finding that an "imaginary supervisor" who did not know about petitioner's protected activities would have removed him for his misconduct "followed, nearly verbatim, the test we stated in *Warren*." Pet. App. A27. The court observed, moreover, that the "imaginary supervisor" test applies only where the employee has established a *prima facie* case of reprisal by proving all four elements set out in *Warren*. In that event, the agency may attempt to rebut the

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[2] Before the court of appeals, petitioner abandoned his additional contention that his removal was the result of racial discrimination. See Pet. App. A9 n.1.

employee's *prima facie* case by showing that a supervisor who did not know about the protected activity would have taken the same adverse action. Here, the AJ took the precaution of applying the imaginary supervisor test even though petitioner had not made out a *prima facie* case of retaliation, thus providing an alternative ground for his decision. *Id.* at A27-A29 & n.5.

Chief Judge Nies dissented. Pet. App. A31-A50. She concluded that two of the five charges—that petitioner disobeyed instructions during a fire drill and failed to report to the office before turning in his vehicle—were not supported by substantial evidence, Pet. App. A34-A36, and that the penalty imposed by the agency was excessive, *id.* at A36-A40. Chief Judge Nies also dissented on the reprisal issue. She conceded that "[l]anguage can be found in *Warren* and in other opinions of [the Federal Circuit] seemingly endorsing the AJ's analysis," but nevertheless concluded that the AJ's analysis was incorrect. The dissenting judge observed that "[a]s an affirmative defense, reprisal comes into play only where the charges would otherwise be sustained, and its application is not statutorily limited to cases where the charges are not serious." *Id.* at A42. The dissenting judge concluded that federal employees are entitled to at least the protection accorded to an untenured teacher who alleges that he is dismissed for engaging in constitutionally protected activity. *Id.* at A42-A43. In *Mt. Healthy City School Dist.* v. *Doyle*, 429 U.S. 274 (1977), the Court held that such an employee has the burden of showing that his conduct was constitutionally protected, and that this conduct was a "substantial" or "motivating" factor in the employer's decsion. The burden then shifts to the employer to show, by a preponderance of the evidence, that it would have reached

the same decision in the absence of the protected conduct. *Id.* at 287.

In the dissenting judge's view, the AJ's finding that "the intensity of the agency's retaliatory motive was high" was sufficient to establish a *prima facie* case of retaliation. Pet. App. A47. To rebut this showing, the dissent argued, "[i]t is not sufficient merely to hypothesize whether an imaginary unprejudiced supervisor, *on the basis of given misconduct*, would have taken an adverse action." *Ibid.* Instead, "[w]hat evidence will overcome a *prima facie* showing of reprisal can be resolved only on a case by case basis." *Id.* at A49. Because the dissenting judge could not determine whether the agency had submitted evidence that might satisfy its burden, she would have remanded the case to the MSPB.

Chief Judge Nies also dissented from the denial of rehearing en banc on the reprisal issue. Pet. App. F1-F5.

ARGUMENT

Petitioner contends (Pet. 4-6) that this Court should grant certiorari to consider the Federal Circuit's use of an "imaginary supervisor" test to analyze federal employees' claims of reprisal. That question is not properly presented in this case. In any event, petitioner's contentions are without merit.

1. This case is not an appropriate vehicle for considering petitioner's objections to the Federal Circuit's "imaginary supervisor" test. As the court of appeals explained (Pet. App. A28 n.9), the AJ applied that test only as "an alternative ground of decision." Consequently, acceptance of petitioner's arguments would not alter the result in this case.

The Federal Circuit applies an "imaginary supervisor" test only if the employee "establishes all four elements of reprisal, *prima facie*." Pet. App. A27. In this case, petitioner failed to make a *prima facie*

showing of the fourth element, *i.e.*, a causal nexus between the agency's retaliatory motive and his dismissal. The court of appeals recognized that petitioner's burden of proof on the causation issue is not "too onerous." *Id.* at A25. The court observed that petitioner was not required to produce direct evidence of a causal nexus; for example, circumstantial evidence that other employees had engaged in similar conduct but received a lesser sanction would have been sufficient to make out a *prima facie* case. *Id.* at A25-A26. But petitioner "offered no such evidence," and "[t]he AJ did not find that [petitioner's] protected activities caused the adverse action." *Id.* at A26.

Petitioner nevertheless asserts (Pet. 5) that "[t]he AJ made a finding establishing a connection" between the agency's retaliatory motive and his removal. To be sure, the dissenting judge stated (Pet. App. A47) that the AJ's finding that "the intensity of the agency's retaliatory motive was high" was sufficient to establish, as a matter of law, a causal connection between the retaliatory motive and the agency's action. But the dissenting judge was in error. As the court of appeals noted (*id.* at A26-A27), the AJ's finding of a strong retaliatory motive shows only that the retaliatory motive *could* have been a factor in the decision, not that it *was* in fact a substantial or motivating factor.[3]

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[3] The dissenting judge construed the AJ's finding of a strong retaliatory motive to refer to petitioner's letter writing and his activity as a union shop steward. But the AJ's finding appears to have been based, at least in part, on petitioner's "supercilious and boastful demeanor" and his practice of "confront[ing] his supervisor at every opportunity." Pet. App. A53. Those behavioral traits are not entitled to protection, and may in fact be the basis for dismissal. See, *e.g.*, *Roberson* v. *Veterans Admin.*, 27 M.S.P.B. 489, 494 (1985) (employee may be dismissed for abusive language and disrespectful behavior).

2. In any event, the court of appeals' "imaginary supervisor" test is reasonable and does not conflict with any decision of this Court or any other court of appeals. That test, as explicated by the court of appeals (Pet. App. A27-A28), applies only "[i]f reprisal has been proven, *prima facie*," and "requires nothing more of the agency than that it present proof on the basis of which the AJ could find that an 'imaginary supervisor' would have taken an adverse action, anyway." The court of appeals' analysis is generally consistent with cases such as *Doyle*, which recognize that the employee's rights are "sufficiently vindicated if [the] employee is placed in no worse a position than if he had not engaged in the conduct." 429 U.S. at 285-286. The imaginary supervisor test restates the essence of *Doyle's* requirement that, once an employee has made out a *prima facie* case, the employer may show, "by a preponderance of the evidence[,] that it would have reached the same decision * * * even in the absence of the protected conduct." *Id.* at 287.

Indeed, the extent of the disagreement between the court of appeals and the dissenting judge in this case is far from clear. The court of appeals noted that "[w]here a *prima facie* case of reprisal has been established, the fact finder should evaluate any rebuttal evidence offered in light of the questions so elaborately set forth in the dissent." Pet. App. A28. And the dissenting judge suggested "that *Warren*, in speaking of an 'imaginary' supervisor's decision, could be given an interpretation in accord with [my] analysis." *Id.* at A48-A49. Thus, it appears that the Federal Circuit's test incorporates all or part of the dissenting judge's analysis.

There is no basis for petitioner's assertion (Pet. 6) that the Federal Circuit has "eviscerate[d]" the reprisal defense by limiting it to cases in which the federal employee has not engaged in any misconduct

warranting discipline. On the contrary, under the Federal Circuit's analysis, reprisal is an affirmative defense that comes into play only if the employee has engaged in misconduct. The reprisal defense is intended to ensure that federal employees are not disciplined for engaging in protected activity; the "imaginary supervisor" test is intended to identify employees who would have been disciplined for misconduct even if they had not engaged in any protected conduct.

Finally, there is no basis for petitioner's assertion (Pet. 6) that the court of appeals employed the "imaginary supervisor" test to determine whether petitioner had made out a *prima facie* case of reprisal. The court of appeals explicitly stated that the "imaginary supervisor" test applies only if the employee has made out a *prima facie* case of reprisal. See Pet. App. A27-A28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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